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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICE CORPORATION and PARSONS & WHITTEMORE, INC.,
Petitioners,

vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Did the court below correctly hold that an arbitration award should not be set aside under 9 U.S.C. § 10 for "evident partiality or corruption" of one of three arbitrators when:

(a) He was not aware of any relationship, direct or indirect, with any party;

(b) His only other "relationship" was, at best, a trivial connection with a witness; and

(c) The court found that there were no personal, financial or associational ties that would affect his impartiality.

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents iii

Table of Authorities iii

Opinion Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reasons for Denying Writ 3

Certificate of Service 6

TABLE OF AUTHORITIES

Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691 (2nd Cir. 1978) 5

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) 4,5

International Produce, Inc. v. A/S Rosshovet, 638 F.2d 548 (2nd Cir.), cert. denied, 451 U.S. 1017 ... 5

Ormsbee Development Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982) 5

Smith v. Phillips, ____ U.S. ____, 71 L.Ed.2d 78 5

Tamari v. Bache Halsey Stuart, 619 F.2d 1196 (7th Cir. 1980), cert. denied, 449 U.S. 873 5

U. S. Wrestling Federation v. Wrestling Div. of A.A.U., 605 F.2d 313 (7th Cir. 1979) 5

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OPINION BELOW

By direction of the court below, the opinion of the United States Court of Appeals for the Eleventh Circuit was not published.[1] This unpublished opinion appears in the appendix to the petition.

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[1]Omitted from the first page of the opinion below reproduced in the appendix of the petition is the following: *"DO NOT PUBLISH"*. The internal operating procedures promulgated by the Eleventh Circuit provide: "Opinions that the panel believes to have no precedential value are not published. All non-published opinions and affirmances without opinion under 11th Cir. R. 25 are printed in table form in the Federal Reporter." (p.15).

JURISDICTION

The petition contains the relevant dates. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254.

STATUTES INVOLVED

Relevant statutory provisions of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 10 are contained in the appendix to the petition. The relevant portion[2] of Rule 52(a), Federal Rules of Civil Procedure is also involved.

STATEMENT OF THE CASE

Respondent refers to the opinion of the court of appeals below which appears in petitioners' appendix.[3]

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[2] "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...."

[3] In the last paragraph on page A-2 of that opinion, there is an obvious typographical error which is irrelevant to the issues presented by the petition, namely, the figure "$2 million" should be "$20 million". See transcript of proceedings in district court, p. 612.

REASONS FOR DENYING THE WRIT

Petitioner has failed to present any "special or important reasons" for the grant of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with a decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with applicable decisions of this Court. Exacerbating this circumstance, P & W[4] questions here findings of fact of the district court which the court of appeals below held to be "correct" and "strong[ly] support[ed]" by the testimony. (A-5, 16)

P & W seeks review to overturn the holdings of the court below and the district court that asserted undisclosed "relationships" of one of three arbitrators, Morton, were insufficient to vitiate the arbitral award. One of these asserted "relationships" was described by the court below (A-16):

> "Harrison International Corporation was a subcontractor on a portion of a hospital construction job in North Carolina. Robbins Corporation, of which Morton was vice president, was general contractor on the job. Harrison, without participation by Robbins, subcontracted a small portion of its work to Yeargin . . ."

The court below termed the asserted relationship "indirect", and held that the testimony "reveals strong support for the conclusion that Morton was unaware of [it]." (A-16, 17)

The other asserted "relationship" was that one Waldron, an expert witness for Yeargin at the arbitration hearing, had lectured at a two day seminar attended by Morton "ten to fifteen

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[4]Respondent, as did petitioners, will refer to petitioners as "P & W" and respondent as "Yeargin."

years prior to the hearing;" and that "some five years before the hearing Morton arranged for some employees to attend a seminar conducted specially for them by Waldron."(A-13) The court below held that this "relationship" was "insufficient to vitiate the arbitration award," since it did not involve "personal, financial or associational ties that would affect the impartiality of the arbitrator." (A-16)

The court below correctly distinguished the trivial connection between Morton and Waldrop from the situation involved in *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 393 U.S. 145 (1968). Although P & W characterized the relationship in *Commonwealth Coatings, supra,* as "sporadic"[1], the plurality opinion of this Court found it markedly different. The circumstances involved the neutral arbitrator and a party, not a witness; and the plurality opinion held that this arbitrator, moreover, had received "patronage" from one of the parties which "was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit." (393 U.S. at 146)

The correctness of the decision below is emphasized in the concurring opinion of Justice White (at 150-151):

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. (Cit.) This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility.

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[1]Petition, p. 7.

> But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators."

Although P & W suggests how "other courts have viewed *Commonwealth Coatings*"[6], the only case there cited antedated *Commonwealth Coatings* by ten years. The fact is that the decision below accords with those of numerous courts of appeals, namely, that evidence of bias or interest of an arbitrator "must be direct, definite and capable of demonstration rather than remote, uncertain or speculative."[7] No court has disagreed.

Indeed, this Court last term in *Smith* v. *Phillips*, ____ U.S. ____, 71 L. Ed.2d 78, reversed lower federal courts which had vacated a state murder conviction on the ground of a failure to disclose knowledge in advance of trial that one of the jurors had applied to the prosecuting attorney's office for a job as an investigator. This Court held that a failure to disclose this circumstance to the defense was no ground for vacating a jury verdict of guilty.

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[6]Petition, p. 11.

[7]*Ormsbee Development Co.* v. *Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982); *Tamari* v. *Bache Halsey Stuart*, 619 F.2d 1196 (7th Cir. 1980), *cert. denied*, 449 U.S. 873; *Andros Compania Maritima* v. *Marc Rich & Co., A.G.*, 579 F.2d 691 (2nd Cir. 1978); *International Produce, Inc.* v. *A/S Rosshovet*, 638 F.2d 548 (2nd Cir.), *cert. denied*, 451 U.S. 1017; *U.S. Wrestling Federation* v. *Wrestling Div. of A.A.U.*, 605 F.2d 313 (7th Cir. 1979).

CONCLUSION

Accordingly, P & W has failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that its petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondent in Opposition upon counsel for all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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This 7th day of December, 1982.

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